

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

TUESDAY, THE 20TH DAY OF OCTOBER 2015/28TH ASWINA, 1937

AS.No. 212 of 1999 (F)

AGAINST THE JUDGMENT IN OS 304/1993 of PRL.S.C.,THALASSERY
DATED 29-08-1998

APPELLANT/PLAINTIFF:

A.C. BHARATHAN, S/O. ANANDAN,
PANNIYANNORE AMSOM, CHAMPAD DESOM,
KANNUR DISTRICT.

BY ADVS. SRI.M.C.SEN (SR.)
SRI.SURESH SUKUMAR
SMT.VIDHYA. A.C

RESPONDENTS/DEFENDANTS 2 AND 4 TO 7:

1. T.P. RAJAGOPAL, S/O NARAYANAN,
ENGINEER, 247 TELANG ROAD,
MATTUNGA, BOMBAY - 19.
2. P.V.MOHANAN, S/O LATE SHANMUGHAN,
LECTURER, MAHARAJA'S COLLEGE,
ERNAKULAM, COCHIN.
3. P.V.MAYA, D/O LATE SHANMUGHAN,
CLERK, R/A RIVER VIEW,
CHETTAMKUNNU, THALASSERY AMSOM,
VADIKKAKAM DESOM, THALASSERY P.O.,
DIST. KANNUR.
4. ANJALI BALAJI, D/O DHANAM RAJAGOPAL,
ASHEESH APARTMENT, JUHU KODILEEDE,
SANTHA CRUZ, BOMBAY.
5. SHARMILA DHARMAPAL, D/O DHANAM RAJAGOPAL,
INJIPARA ESTATE, VALPARA P.O.,
COIMBATORE DISTRICT, TAMILNAD.

BY ADV. SRI.GOVIND K.BHARATHAN (SR.) - R2
BY ADV. SMT.M.HEMALATHA - R2
BY ADV. SMT.S.USHA SAI
BY ADV. SRI.GRASHIOUS KURIAKOSE (SR.) - R3

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 20-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P. N. RAVINDRAN
&
BABU MATHEW P. JOSEPH, JJ.**

A.S.No.212 of 1999

Dated this the 20th day of October, 2015

JUDGMENT

P. N. Ravindran, J.

The appellant is the plaintiff in O.S.No.304 of 1993 on the file of the Court of the Subordinate Judge of Thalassery. The respondents are defendants 2 and 4 to 7 respectively therein. The suit instituted by the appellant on 15.07.1993 for specific performance of Ext.A1 agreement dated 28.10.1992 was dismissed after trial by judgment delivered on 29.08.1998. The plaintiff has, aggrieved thereby, filed this appeal. The brief facts of the case are as follows:

2. The appellant instituted O.S.No.304 of 1993 on the averment that the first defendant had as per Ext.A1 agreement dated 28.10.1992 agreed to sell plaint schedule items 1 and 2 having a total area of 28 cents to him for an agreed sale consideration of ₹11,000/- per cent. He had averred that though on the date of agreement, the sum of ₹50,000/- was paid as advance to the first defendant and later

the sum of ₹50,000/- was paid as advance to the second defendant and the sum of ₹25,000/- was paid as advance to the third defendant, raising untenable grounds, defendants 2 and 3 returned the amount paid to them as advance and also disowned their liability to abide by Ext.A1 agreement. The plaintiff had further averred that the demand drafts for the sum of ₹75,000/- (₹50,000/- + ₹25,000/-) sent to him by defendants 2 and 3 were returned, that he was always and is ready and willing to deposit the balance sale consideration of ₹1,47,250/- and meet the expenses for registration of the sale deed. The plaintiff had in the plaint prayed for a decree directing the defendants to execute and register a sale deed in respect of the plaint schedule property after receiving the balance sale consideration. He had, in the alternative, prayed that the defendants may be directed to return the amount paid by him as advance together with interest.

3. Upon receipt of notice, the first defendant entered appearance and filed a written statement denying and disputing the genuineness of Ext.A1 agreement to the extent it takes in the residential building

situate in item No.1 of the plaint schedule. She contended that she was aged 80 years on the date of the agreement; that she was completely deaf and had only poor sight and was dependant on others. She contended that she was mislead by Sreekumar, one of the attesting witnesses to Ext.A1 agreement, into signing the agreement. Defendants 2 and 3 who are the brother and sister-in-law respectively of the first defendant filed a joint written statement contending inter alia that they are not signatories to Ext.A1 agreement; that they have not ratified the same and that the first defendant who has signed the agreement on their behalf had no power or authority to represent them. They also contended that the sum of ₹75,000/- was sent by the plaintiff in a clandestine manner and that on coming to know of the same, the said amount was returned, but the plaintiff did not accept the same. They contended that the plaintiff is not entitled to specific performance of Ext.A1 agreement as against them. They had also reiterated their readiness and willingness to refund the sum of ₹75,000/- sent to them.

4. Before the trial court, the power of attorney holder of the plaintiff who is also his elder brother was examined as PW1, the broker who is said to be involved in the transaction was examined as PW2 and Exts.A1 to A16 were produced and marked on the side of plaintiff. On the side of defendants, the son of the first defendant who was later impleaded as the supplemental fourth defendant in the suit was examined as DW1 and the second defendant was examined as DW2. They also produced and marked Exts.B1 to B4. The documents produced by DW2 were marked as Exts.X1 to X30. The trial court considered the rival contentions and held that the first defendant had no power or authority to enter into Ext.A1 agreement on behalf of the other defendants. The trial court also held that there is no concluded contract between the parties. Having regard to the conduct of the parties and the attendant circumstances, the trial court held that the discretion under section 20 of the Specific Relief Act, 1963 has to be exercised in favour of the defendants. The relief of specific performance was accordingly declined and a decree was passed

allowing the plaintiff to realise the sum of ₹1,25,000/- with interest at 12% per annum from the date of suit till realisation. Hence this appeal.

5. We heard Sri.M.C.Sen, learned senior advocate appearing for the appellant, Sri.Govind K. Bharathan, learned senior advocate appearing for the second respondent and Sri.Grashious Kuriakose, learned senior advocate appearing for the third respondent. Sri.M.C.Sen, learned senior counsel appearing for the appellant contended, relying on Ext.X2 and Ext.X26 letters which admittedly contain the signature of the second defendant who was examined as DW2, that he has by the above said letters ratified Annexure-A1 agreement and therefore, the trial court erred in declining to grant a decree for specific performance. Learned senior counsel contended that in such circumstances, notwithstanding the fact that the first defendant had not been authorised by defendants 2 and 3 to enter into Ext.A1 agreement, the appellant is entitled to a decree for specific performance. Learned senior counsel also submitted that apart from ratifying the agreement, defendants 2 and 3 had also accepted the

sum of ₹75,000/- which was sent to them by demand drafts; that later, due to an afterthought, the said amount was returned and the suit was thereupon instituted. Learned senior counsel contended that the plaintiff was and is always ready and willing to perform his part of the contract, that there was no default on his part and that it was on account of the default committed by the defendants that the contract was not performed within the stipulated time. Learned senior counsel also contended that in such circumstances, as the plaintiff has proved that a valid agreement has been entered into between the plaintiff on the one hand and the first defendant on the other and the other defendants had ratified the same, the plaintiff is entitled to a decree for specific performance.

6. Per contra, Sri.Govind K. Bharathan and Sri.Grashious Kuriakose, learned senior counsel appearing for respondents 2 and 3 submitted that it has come out in evidence that the first defendant had no power or authority to represent defendants 2 and 3; that defendants 2 and 3 have not held out the first defendant as their agent

or power of attorney, that the plaintiff has no case that he had met and interacted with defendants 2 and 3 or their power of attorney and therefore, by no stretch of imagination can it be said that Ext.A1 would bind defendants 2 and 3. Referring to Exts.X2 and X26 and also the testimony tendered by the second defendant who was examined as DW2, learned senior counsel appearing for respondents 2 and 3 submitted that it has come out in evidence that defendants 2 and 3 had engaged PW2, a broker, to find out a purchaser for the land belonging exclusively to the third defendant, that neither PW2 nor PW1 has disputed the said fact and therefore, nothing turns on the contents of Exts.X2 and X26 letters. Learned senior counsel submitted that DW2 has in chief examination categorically stated that he has not seen the original of Ext.A1 agreement, that he has not agreed to sell the property to the plaintiff, that the terms and conditions had not been agreed upon by him, that he has also not ratified Ext.A1 agreement and therefore, a decree for specific performance of Ext.A1 agreement was rightly declined by the court below. Learned senior counsel also

submitted that it was in a clandestine manner that the sum of ₹75,000/- was sent by the plaintiff to defendants 2 and 3, that on realising the same, the said amount was returned to the plaintiff, but the plaintiff refused to receive the same and returned the demand drafts and thereafter instituted the suit for specific performance.

7. We have considered the submissions made at the Bar by learned counsel on either side. We have also gone through the pleadings and the materials on record. Ext.A1 agreement is dated 28.10.1992. The last date stipulated for performance of contract was 27.01.1993. The time for performance was fixed as three months. The plaintiff did not, for reason best known to him, institute the suit till 15.07.1993. In other words, he waited for six months beyond the time limit stipulated in Ext.A1 agreement for performance of the contract, before instituting the suit. It has also come out in evidence that the first defendant had no power or authority to represent defendants 2 and 3. It is also not in dispute that the sharer to whom item No.3 of the plaint schedule property belongs, was not joined as a defendant in

the suit. It is also not in dispute that the first defendant had only $\frac{1}{2}$ share in plaint schedule item No.1. It has also come out in evidence that the plaintiff had no occasion to meet with defendants 2 and 3 and discuss about a sale of the plaint schedule property. The plaintiff has no case that prior to the execution of Ext.A1 agreement, he had met and interacted with defendants 2 and 3 and that they had agreed to sell the third defendant's share in the plaint schedule property to him. From the materials on record and the attendant circumstances, we are not persuaded to hold, notwithstanding the persuasive submissions made by Sri.M.C.Sen, learned senior counsel appearing for the appellant, that defendants 2 and 3 have ratified Ext.A1 agreement. A ratification can be made only if they had held out the first defendant as their agent and the first defendant had purporting to act as their agent entered into Ext.A1 agreement. The plaintiff has not, in the instant case pleaded that the defendants 2 and 3 had held out the first defendant as their agent or that defendants 2 and 3 had by their acts or deeds, made him believe that the first defendant is their power of

attorney or agent. It has also come out in evidence that the second defendant who was examined as DW2 had instructed PW2 to find out a purchaser for item No.2 of the plaint schedule which belongs exclusively to the third defendant. There is no mention in Ext.A2 letter that the sale is in respect of plaint schedule item No.1. There is also no mention in Ext.A2 letter sent by PW2 to the second defendant that it relates to Ext.A1 agreement entered into between the first defendant and the plaintiff. The name of the plaintiff is also not referred to therein. In such circumstances, the endorsement purported to have been made by the second defendant on the obverse of Ext.A2 letter can only be in relation to plaint schedule item No.2 which belongs exclusively to the third defendant. Moreover, the third defendant has not stated that she had agreed to sell plaint schedule item No.2 to the plaintiff. There is also no mention whatsoever in Ext.A2 letter that the second defendant has agreed to sell his share over plaint schedule item No.1 to the plaintiff. In short, there is no material on record to prove that a concluded contract between the parties had come into

existence so as to compel the defendants to perform their part of the obligation. The discretion conferred on the court below under section 20 of the Specific Relief Act, 1963, was, in such circumstances, rightly exercised in favour of the defendants. As regards the payment of the sum of ₹75,000/- to defendants 2 and 3, defendants 2 and 3 have specifically pleaded that such payment has made without any justification and that on realising the same the said amount was returned to the plaintiff. The plaintiff has not disputed the fact that defendants 2 and 3 had at the earliest opportunity returned the sum of ₹75,000/- to him. His case is that to wriggle out of the obligations arising from Ext.A1 agreement, defendants 2 and 3 returned the said amount to him. In the light of the finding entered by us that defendants 2 and 3 are not bound by Ext.A1 agreement, nothing turns on the payment of the sum of ₹75,000/- by the plaintiff to the defendants 2 and 3, especially in view of the fact that they had at the earliest opportunity returned the said sum to him. In any case, the impugned judgment protects the rights of the plaintiff in that respect.

The court below has by impugned judgment granted a decree allowing him to realise not only the advance paid to the first defendant but also the sum of ₹75,000/- paid by him to defendants 2 and 3 together with interest at 12% per annum from the date of plaint till realisation. It has also come out in evidence that first defendant who was aged 80 years, was totally deaf and that she had poor eye sight. She had in the written statement filed by her contended that she was mislead by Sreekumar, one of the attesting witness to Ext.A1 agreement into signing the original of Ext.A1 agreement. The court below has taken note of the said aspect as well when it declined to grant the relief of specific performance of Ext.A1 agreement. On an over all view of the matter and having regard to the conduct of the parties and the attendant circumstances, we are not persuaded to hold that the discretion exercised in favour of the defendants by the court below is perverse or that it was not warranted by the pleadings and the evidence on record.

For the reasons stated above, we hold that there is no merit in

the instant appeal. The appeal fails and is accordingly dismissed. No costs.

Sd/-
P. N. RAVINDRAN
JUDGE

Sd/-
BABU MATHEW P. JOSEPH
JUDGE

kns/-

//TRUE COPY//

P.A. TO JUDGE